



(Billing Code 7510-13)

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1816 and 1852

RIN 2700-AE32

**NASA Federal Acquisition Regulation Supplement: Award Term
(NFS Case 2016-N027)**

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: NASA is issuing a final rule amending the NASA Federal Acquisition Regulation (FAR) Supplement (NFS) to add policy on the use of additional contract periods of performance or "award terms" as a contract incentive.

DATES: Effective: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Marilyn E. Chambers, telephone 202-358-5154.

SUPPLEMENTARY INFORMATION:

I. Background

NASA published a proposed rule in the Federal Register at 81 FR 89038 on December 9, 2016, to implement policy addressing the use of "award terms" or additional contract periods of performance for which a contractor may earn if the contractor's performance is superior, the Government has an on-going need for the requirement, and funds are available for the additional

period of performance. The policy provides a non-monetary incentive for contractors whose performance is excellent. An award term incentive would be used where a longer term relationship (generally more than five years) between the Government and a contractor would provide benefits to both parties. Benefits of award term incentives include a more stable business relationship both for the contractor and its employees (thus retaining a skilled, experienced workforce), motivating excellent performance (including cost savings), fostering contractor capital investment, increasing the desirability of the award (potentially increasing competition), and reduced administrative costs and disruptions in preparing for and negotiating replacement contracts.

Award terms are an incentive and not the same as exercising an option as set forth in FAR 17.207. While there are similarities between an award term and an option, such as funds must be available and the requirement must fulfill an existing Government need, the key difference is that an option may be exercised when the contractor's performance is acceptable, while earning an award term requires sustained excellent performance. Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

NASA reviewed the public comments in the development of the final rule. An editorial change was made to the rule for

clarification. No other changes to the proposed rule were made. A discussion of the comments and the change made to the rule as a result of those comments are provided as follows:

A. Changes. No changes are being made to the final rule as a result of the public comments received with the exception of a minor editorial change.

B. Analysis of Public Comments.

Comment: One respondent stated exceeding the five-year limit on contracts using award terms, could limit competition, limit the range of solutions available to NASA, and raise prices for the government and would lead to sole source contracting, reduced competition, and higher costs to the government.

Response:

FAR 17.204(e) states, unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services. NFS 1817.204(e) provides for exceptions to the 5-year period of performance limitation under Agency contracts. Concerning the impact of the use of award terms on competition, range of solutions available to NASA, and prices, the rule at 1816.405-277(c) states the factors to consider when determining whether to use award terms include, market stability, the potential changes and advancements in technology, and flexibility to change direction with mission changes.

Comment: One respondent stated that contractors would be more interested in proposing on a contract if the contract has the potential for additional years of business. The respondent opined a better course of action is for NASA to issue a request for proposals allowing for the incumbent contractor on an award term contract to compete for a follow-on contract alongside any other interested parties and that this competition would provide NASA with a range of potential solutions and lower costs.

Response: As stated in the policy, the benefits of a longer-term relationship versus more frequent competitions must be considered when determining if an award term incentive is appropriate. The factors considered in this decision would be documented in the Determination and Findings, required in under current NFS policy for incentive contracts, and provided to the Associate Administrator for Procurement for review and approval.

Comment: One respondent inquired about NASA's current award term policy, Procurement Information Circular (PIC) 06-02, Use of Award Term Incentive, dated January 25, 2006, and NASA's current use of award term incentives. Additionally, the respondent referenced an award term contracting pilot program in the late 1990's with the intent of assessing the use of award term contracts at NASA. The respondent questioned how the pilot and (PIC) informed this rule.

Response: The PIC and pilot program the respondent references are more than a decade old. The pilot was conducted to provide information from the NASA procurement organizations on their use of award term incentives. At the time of that pilot, NASA had 12 award term contracts. As discussed in the Initial Regulatory Flexibility Analysis contained in the proposed rule, NASA has ten award term contracts. The PIC was used as a starting point for drafting this rule. Additional research on the use of award term contracts and comments from the NASA procurement organizations also contributed to the formulation of this rule.

Comment: Another respondent stated the proposed clause is ambiguous, specifically, paragraph (a) states that the CO "may" award a term, but paragraph (f) gives reasons for not awarding a term. The respondent questioned, if none of those reasons apply, must the CO award a term and, if so what does the "may" mean and, if not, why have paragraph (f).

Response: Paragraph (a) of the clause is a general statement that the contracting officer will rely on the Award Term Plan to determine if the contractor is eligible for an award term. "May" is used in paragraph (a) because the decision to extend the contract for the number and duration of award terms is discretionary, i.e., a contractor may earn an award term based on meeting the requirements of the Award Term Plan, but the contracting officer, for a variety of reasons, may decide not to

grant the award term. NASA agrees there is some overlap of paragraphs (a) and (f). To remove this overlap, paragraph (a) is revised to remove the phrase "subject to the Government's continuing need for the contract and the availability of funds." Paragraph (f) of the clause, which addresses the Government's right not to grant or cancel the award term, states the award term may not be granted if there is no continuing need or if funds are not available.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

NASA prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The objective of this rule is to implement policy in the NASA Federal Acquisition Regulation Supplement (NFS) to address the use of "award terms" or additional contract periods of performance for which a contractor may earn if the contractor's performance is superior, the Government has an on-going need for the requirement, and funds are available for the additional period of performance. This policy provides a non-monetary incentive for contractors whose performance is sustained at an excellent level.

No comments were received in response to the initial regulatory flexibility analysis.

The Federal Procurement Data System (FPDS) does not track award fee contracts, but a survey of NASA's procurement organizations shows there are currently 10 active award term contracts. Of these, six are with small businesses. A range of services are covered, such as logistics, facilities or technical management and information technology.

There are no special reporting, recordkeeping, and other compliance requirements associated with this rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

NASA was unable to identify any alternatives that would reduce the economic impact on small entities. However, NASA does not expect this rule to have any significant economic impact on small entities, because it does not impose any new requirements on contractors.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 1816 and 1852

Government procurement.

Manuel Quinones,

NASA FAR Supplement Manager.

Accordingly, 48 CFR parts 1816 and 1852 are amended as follows:

1. The authority citation for parts 1816 and 1852 continues to read as follows:

Authority: 51 U.S.C. sec. 20113(a) and 48 CFR chapter 1.

PART 1816—TYPES OF CONTRACTS

2. Amend section 1816.001 by adding in alphabetical order the definition "Term-determining official" to read as follows:

1816.001 Definitions.

* * * * *

Term-determining official means the designated Agency official who reviews the recommendations of the Award-Term Board in determining whether the contractor is eligible for an award term.

* * * * *

3. Add section 1816.405-277 to read as follows:

1816.405-277 Award term.

(a) An award term enables a contractor to become eligible for additional periods of performance or ordering periods under a service contract (as defined in FAR 37.101) by achieving and sustaining the prescribed performance levels under the contract. It incentivizes the contractor for maintaining superior performance by providing an opportunity for extensions of the contract term.

(b) Award terms are best suited for acquisitions where a longer term relationship (generally more than five years) between the Government and a contractor would provide significant benefits to both. Motivating excellent performance, fostering contractor capital investment, and increasing the desirability of the award, thus potentially increasing competition, are benefits that may justify the use of award terms.

(c) While the administrative burden and cost of more frequent procurements to both the Government and potential offerors should be considered when determining whether to use award terms, this decision must be weighed against market stability, the potential changes and advancements in technology, and flexibility to change direction with mission changes and associated frequent procurements.

(d) Award terms may be used in conjunction with contract options under FAR 17.2. Award terms are similar to contract options in that they are conditioned on the Government's continuing need for the contract and the availability of funds. However, FAR 17.207(c)(7) states the contracting officer must determine that the contractor's performance has been acceptable, e.g., received satisfactory ratings. In contrast, to become eligible for an award term, the contractor must maintain a level of performance above acceptable as specified in the Award Term Plan (see 1816.405-277(i)). In contracts with both option periods and award terms, the award term period of performance or ordering period shall begin after completion of any option period of performance or ordering period.

(e) Contracts with award terms shall include a base period of performance or ordering period and may include a designated number of option periods during which the Government will observe and evaluate the contractor's performance allowing the

contractor to earn an award term. Additionally, as specified in the Award Term Plan, the contractor may also be evaluated for additional award terms during performance of an earned award term. If the contractor meets or exceeds the performance requirements, there is an on-going need for and desire to continue the contract, funds are available, and the contractor is not listed in the System for Award Management Exclusions, then the contractor may be eligible for contract extension for the period of the award term.

(f) Contracts with award terms shall comply with FAR and NFS restrictions on the overall contract length, such as the 5-year period of performance limitation found at NFS 1817.204.

(g) Award terms may only be used in acquisitions for services exceeding \$20 million dollars. Use of award terms for lower-valued acquisitions may be authorized in exceptional situations such as contract requirements having direct health or safety impacts, where the judgmental assessment of the quality of contractor performance is critical.

(h) Consistent with the Competition in Contracting Act and general procurement principles, the potential award term periods in a procurement must be priced, evaluated, and considered in the initial contract selection process in order to be valid.

(i) All contracts including award terms shall be supported by an Award Term Plan that establishes criteria for earning an

award term and the methodology and schedule for evaluating contractor performance. A copy of the Award Term Plan shall be included in the contract. The contracting officer may unilaterally revise the Award Term Plan. Award Term Plans shall-

(1) Identify the officials to include Term-Determining Official involved in the award term evaluation and their function;

(2) Identify and describe each evaluation factor, any subfactors, related performance standards, adjectival ratings, and numerical ranges or weights to be used. The contracting officer should follow the guidance at 1816.405-274 in establishing award term evaluation factors and 1816.405-275 in establishing adjectival rating categories, associated descriptions, numerical scoring system, and weighted scoring system;

(3) Specify the annual overall rating required for the contractor to be eligible for an award term that reflects a level of performance above acceptable and the number of award terms the contractor may qualify for based on the rating score;

(4) Identify the evaluation period(s) and the evaluation schedule to be conducted at stated intervals during the contract period of performance or ordering period so that the contractor will periodically be informed of the quality of its performance

and the areas in which improvement is expected (e.g., six months, nine months, twelve months, or at other specific milestones), and when the decision points are for the determination that the contractor is eligible for an award term; and

(5) Identify the contract's base period of performance or ordering period, any option period(s), and total award-term periods(s). Award term periods shall not exceed one year.

(j)(1) The Government has the unilateral right not to grant or to cancel award term periods and the associated Award Term Plans if—

(i) The contractor has failed to achieve the required performance measures for the corresponding evaluation period;

(ii) After earning an award term, the contractor fails to earn an award term in any succeeding year of contract performance, the contracting officer may cancel any award terms that the contractor has earned, but that have not begun;

(iii) The contracting officer notifies the contractor that the Government no longer has a need for the award term period before the time an award term period is to begin;

(iv) The contractor represented that it was a small business concern prior to award of the contract, the contract was set-aside for small businesses, and the contractor rerepresents in accordance with FAR clause 52.219-28 Post-Award Small Business

Program Rerepresentation, that it is no longer a small business;
or

(v) The contracting officer notifies the contractor that funds are not available for the award term.

(2) When an award term period is not granted or cancelled, any—

(i) Prior award term periods for which the contractor remains otherwise eligible are unaffected.

(ii) Subsequent award term periods are also cancelled.

(k) Cancellation of an award term period that has not yet commenced for any of the reasons set forth in paragraph (j) of this section shall not be considered either a termination for convenience or termination for default, and shall not entitle the contractor to any termination settlement or any other compensation. If the award term is cancelled, a unilateral modification will cite the clause as the authority.

4. Amend section 1816.406-70 by adding paragraph (g) to read as follows:

1816.406-70 NASA contract clauses.

* * * * *

(g) Insert the clause at 1852.216-72, Award Term in solicitations and contracts for services exceeding \$20 million when award terms are contemplated.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add section 1852.216-72 to read as follows:

1852.216-72 Award term.

As prescribed in 1816.406-70(g), insert the following clause:

AWARD TERM

**(INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF
PUBLICATION IN THE FEDERAL REGISTER)**

(a) Based on overall Contractor performance as evaluated in accordance with the Award Term Plan, the Contracting Officer may extend the contract for the number and duration of award terms as set forth in the Award Term Plan.

(b) The Contracting Officer will execute any earned award term period(s) through a unilateral contract modification. All contract provisions continue to apply throughout the contract period of performance or ordering period, including any award term period(s).

(c) The Government will evaluate offerors for award purposes by adding the total price for all options and award terms to the price for the basic requirement. This evaluation will not obligate the Government to exercise any options or award term periods.

(d) The Award Term Plan is attached in Section J. The Award Term Plan provides the methodology and schedule for evaluating Contractor performance, determining eligibility for an award

term, and, together with Agency need for the contract and availability of funding, serves as the basis for award term decisions. The Contracting Officer may unilaterally revise the Award Term Plan. Any changes to the Award Term Plan will be in writing and incorporated into the contract through a unilateral modification citing this clause prior to the commencement of any evaluation period. The Contracting Officer will consult with the Contractor prior to the issuance of a revised Award Term Plan; however, the Contractor's consent is not required.

(e) The award term evaluation(s) will be completed in accordance with the schedule in the Award Term Plan. The Contractor will be notified of the results and its eligibility to be considered for the respective award term no later than 120 days after the evaluation period set forth in the Award Term Plan. The Contractor may request a review of an award term evaluation which has resulted in the Contractor not earning the award term. The request shall be submitted in writing to the Contracting Officer within 15 days after notification of the results of the evaluation.

(f)(1) The Government has the unilateral right not to grant or to cancel award term periods and the associated Award Term Plan if—

(i) The Contractor has failed to achieve the required performance measures for the corresponding evaluation period;

(ii) After earning an award term, the Contractor fails to earn an award term in any succeeding year of contract performance, the Contracting Officer may cancel any award terms that the Contractor has earned, but that have not begun;

(iii) The Contracting Officer has notified the Contractor that the Government no longer has a need for the award term period before the time an award term period is to begin;

(iv) The Contractor represented that it was a small business concern prior to award of this contract, the contract was set-aside for small businesses, and the Contractor rerepresents in accordance with FAR clause 52.219-28, Post-Award Small Business Program Rerepresentation, that it is no longer a small business; or

(v) The Contracting Officer has notified the Contractor that funds are not available for the award term.

(2) When an award term period is not granted or cancelled, any-

(i) Prior award term periods for which the contractor remains otherwise eligible are unaffected, except as provided in paragraph (g) of this clause; or

(ii) Subsequent award term periods are also cancelled.

(g) Cancellation of an award term period that has not yet started for any of the reasons set forth in paragraph (f) of this clause shall not be considered either a termination for

convenience or termination for default, and shall not entitle the Contractor to any termination settlement or any other compensation.

(h) Cancellation of an award term period that has not yet commenced for any of the reasons set forth in paragraphs (f) and (g) of this clause shall not be considered either a termination for convenience or termination for default, and shall not entitle the Contractor to any termination settlement or any other compensation. If the award term is cancelled, a unilateral modification will cite this clause as the authority.

(i) Funds are not presently available for any award term. The Government's obligation under any award term is contingent upon the availability of appropriated funds from which payment can be made. No legal liability on the part of the Government for any award term payment may arise until funds are made available to the Contracting Officer for an award term and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

(End of clause)